SEP 23, 19

MICHAEL RODAK, JR.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-321

JOSEPH LUIS DUNN, *Petitioner*,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

JOSEPH LUIS DUNN, *Petitioner,*

VS.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The petitioner Joseph Luis Dunn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 27, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 27, 1974. A timely petition for rehearing *en banc* was denied on August 15, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 2350.

QUESTIONS PRESENTED

1. Is the following statutory and administrative practice constitutional, that is, does it violate due process of law and constitute invidious discrimination:

Eastern Hemisphere permanent residents, who are convicted of possession of marijuana, are eligible to seek relief from deportation whereas long-time permanent residents from the Western Hemisphere (Mexicans), convicted of possession of marijuana, are precluded from seeking similar relief from deportation?

2. Is a lawful permanent resident and native of the Western Hemisphere (Petitioner), who is convicted of possession of marijuana in the United States after entry, statutorily eligible for discretionary relief from deportation under sections 245 and 212(c) of the Immigration and Nationality Act even though Petitioner is not technically "returning to the United States after a voluntary departure"?

STATUTORY PROVISIONS INVOLVED

Section 212(c) of the Act provides in relevant part:

> "aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to paragraphs (1)-(25) . . . of subsection (a) of this section."

Section 245 of the Act provides in relevant parts:

> "(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available at the time of his application.
>
> . . . .
>
> (c) The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere . . . ."

STATEMENT OF THE CASE

Petitioner, a native and citizen of Mexico, entered the United States as a lawful permanent resident at

the age of 11. (*R 69) He is married to a United States citizen and has a three-year-old minor child who was born in the United States of this marriage. (R 63) Petitioner is 26 years of age and has permanently resided in the United States for 15 years. (R 70)

The Immigration and Naturalization Service (hereinafter referred to as "the Service") alleged in an Order to Show Cause in Deportation Proceedings that the petitioner was convicted of the offense of unlawful possession of marijuana in violation of section 11530 of the California Health & Safety Code on April 31, 1969 in the Superior Court of the State of California for the County of San Luis Obispo. (R 67) Petitioner, who appeared at the deportation hearing on August 7, 1969 without legal counsel, admitted the allegation. (R 58, lines 6-10; R 61, lines 2-3)

On August 7, 1969 petitioner was found deportable as charged in the Order to Show Cause, having been convicted of a narcotics offense, possession of marijuana. (I & N Act, 241[a] [11])

Petitioner thereafter made several attempts to overturn the deportation order. The nature of each attempt has been amply described in the Board of Immigration Appeals Decision denying the Motion to Reopen on May 15, 1972 and will not be reiterated herein. (R 3)

On March 9, 1972, petitioner through his present counsel filed a Motion to Reopen seeking discretionary relief under section 212(c) of the I & N Act. (R 8)

*R refers to the Certified Administrative Transcript filed with the Court pursuant to section 106 of the Immigration and Nationality Act.

The Board of Immigration Appeals (hereinafter referred to as "the Board") denied the Motion to Reopen on May 15, 1972 on the ground that petitioner, a native of the Western Hemisphere, was not statutorily eligible for adjustment of status under section 245 of the I & N Act and therefore was ineligible for section 212(c) discretionary relief from deportation. The Board reasoned that the discretionary relief provided by section 212(c) of the I & N Act could only be available when *coupled* with an application for adjustment of status, section 245 of the I & N Act. (R 3)

Petitioner has exhausted his administrative remedies by moving to reopen. The Motion to Reopen was denied by the Board on May 15, 1972. (R 5)

Petitioner, pursuant to section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a, sought review in the Ninth Circuit Court of Appeals (1) a final order of deportation; and (2) the determination of the Board of Immigration Appeals denying the Motion to Reopen the deportation proceedings. The Ninth Circuit affirmed petitioner's deportation on June 27, 1974. A timely Petition for Rehearing was denied on August 15, 1974 by the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

1. IMPORTANT CONSTITUTIONAL ISSUES ARE RAISED

A. A statutory and administrative requirement which precludes Mexicans from discretionary relief from deportation is discriminatory and violative of due process of law guaranteed under the constitution.

Aliens from the Eastern Hemisphere (who are convicted of possession of the questionably harmful drug, marijuana) are entitled to seek discretionary relief from the Attorney General from deportation, whereas individuals from the Western Hemisphere are not. See the discussion of *Matter of Smith, infra,* and the decision of the Board of Immigration Appeals denying the Motion to Reopen. (R 4) Such a practice, interpretation and statutory enactment is unconstitutional and inconsistent with due process of law.

In the United States an alien stands on an equivalent footing with citizens in several respects. For example, (1) the Constitution assures him the same measure of economic opportunity (*Yick Wo v. Hopkins,* 118 U.S. 356 [1886]); and (2) he must be accorded the protection of the Fifth and Sixth Amendments in criminal proceedings against him (*Wong Wing v. U.S.,* 163 U.S. 228 [1896]). In other respects, however, he is not looked upon as having an equivalent status: (1) he cannot stand for election to many public offices due to the constitutional requirement of citizenship; (2) his right to travel outside the United States is subject to restrictions not applicable to citizens (8 U.S.C. § 210 [1924]); and (3) although he is guaranteed the protection of the First and Fifth Amendments, (*U.S.* ex rel *Mezei v. Shaugh-*

nessy, 195 F.2d 964, [2nd Cir. 1952]), it has been held that this constitutional protection is not given him as a matter of right but is in the nature of a privilege (*Harisiades v. Shaughnessy,* 342 U.S. 580 [1952]). The protection given aliens by the Constitution therefore has not been guarded by the courts with the vigor and clarity that a citizen could expect.

The Constitution requires that we treat resident aliens on the level of justice close to that dispensed to citizens because, among other reasons, instead of requiring him to become naturalized if he intends to settle here, we have chosen to permit him to remain indefinitely and to become a full-fledged member of the community in which he lives; to be employed; to own property; to marry and raise a family; to pay taxes; to serve in the armed forces; and otherwise to participate in all of the activities save those reserved for citizens, such as voting. See *Report of the President's Commission on Immigration and Naturalization* 193 (1953).

Numerous decisions of this Court have uplifted the dignity of man, such as *Brown v. Board of Education,* 347 U.S. 483 (1954). The deportation of long-time residents deserves equal attention by this Court since deportation deprives "a man more directly of the things that make life worth living." *Ng Fung Ho v. White,* 259 U.S. 276, 284, 42 S.Ct. 492, 495 (1922).

Justice Brewer dissenting in *Fong Yue Ting v. U.S.* (1893), 149 U.S. 698, 734, 13 S.Ct. 1016, 1030 describes the unique status of a lawful permanent resident as contrasted to a temporary visitor:

> "That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through or temporarily in it, has long been recognized by the law of nations." *Fong Yue Ting, v. U.S., supra,* at 734.

Justice Brewer continued to describe the permanent resident's rights under the Constitution:

> "Arbitrary and despotic power can no more be exercised over them (permanent residents), with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote, or hold any public office. As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is, in my judgment, to ignore the teachings of our history, the practice of our government, and the language of our constitution." 13 S.Ct. at 1038. (addition supplied)

How can the courts justify the application of the due process and equal protection clauses as they relate to procedural rights (*The Japanese Immigrant Case* [189 U.S. 86, 23 S.Ct. 611, 47 L.Ed 721 (1903)]) and ignore their application as a protection of substantive rights, the right of permanent residency? See also the 9th Circuit's discussion of Congressional "exclusivism" (Appendix p. 4). This distinction and application between due process as to procedure and ignoring due process as a protection or substantive right has generated critical commentary. See Note, "Immigration and Nationality," 66 Harv.L.Rev. 643, 681-682 (1953);

Note, 7 Ala.L.Rev. 127 (1955); Bullitt, "Deportation as a Denial of Substantive Due Process," 28 Wash.L. Rev. 205 (1953); Note, "Constitutional Restraints on the Expulsion and Exclusion of Aliens," 37 Minn.L. Rev. 440 (1953); Note, "What Price Security," 1 Wayne L.Rev. 132 (1955); Hesse, "The Constitutional Status of the Lawfully Admitted Permanent Resident Alien," 68 Yale L.J. 1578, 69 Yale L.J. 261 (1959) (a comprehensive analysis and criticism of all the Supreme Court decisions); Boudin, "The Settler Within Our Gates," 28 N.Y.U.L.Rev. 266, 451, 634 (1951); Note, "Resident Aliens and Due Process," 8 Villanova L.R. 566 (1963).

Because of this irreconcilable conflict over substantive rights and procedural rights it is now time for this Court to unequivocally reaffirm the holding of *Marbury v. Madison* (1803), 1 Cranch 137, 2 L.Ed. 60 that "it is emphatically the *province* and *duty* of the judicial department to say what the law is." *Id.*, at 177 (emphasis added.) This Court should intrepidly proceed, as it did in *Powell v. McCormack* (1969), 395 U.S. 486, 549 to interpret whether Congress has acted in a manner at variance with the Constitution. And in *Baker v. Carr* (1962), 369 U.S. 186 at 211, the Court stated:

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution".

The question in this case is not one of whether Congress has the power "to terminate its hospitality" (see the 9th Circuit's Opinion citing Justice Frankfurter in *Harisiades v. Shaughnessy* [1952], 345 U.S. 580 at page 597), but whether Congress may discriminate against a long-time resident who has a Constitutional right to remain here. When one characterizes petitioner's standing as a "right to remain here" (see Justice Douglas' dissent in *Harisiades*), the injustice of allowing persons from one side of the globe a remedy to remain herein and deny it to others is obvious. As this Court recently said in *United States v. Richard M. Nixon* (July 24, 1974) Nos. 73-1766 and 73-1834 (No. 73-1766, p. 22):

> "In designing the structure of our government and dividing and allocating the sovereign power among three coequal branches, the framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.
>
> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches, separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) Jackson J. concurring.

The Ninth Circuit attempts to rationalize section 245 of the Act of 1952 on the ground that it was an attempt by Congress as "a method of *balancing the equities* between quota and nonquota countries . . .".

(See page 5 of the Opinion) This rationale of comparing petitioner to an alien knocking at our gates with no rights or very few cannot logically or fairly be applied to petitioner, a long-time resident alien who has put down roots here. See O'Brian, "New Encroachments on Individual Freedom," 66 Har.L. Rev. 1, 19 (1953).

Justice Brewer more accurately stated the issue before the court as follows:

> "There is no dispute about the power of Congress to *prevent the landing of aliens* in the country. The question is as to the power of Congress to deport them, without regard to the guaranties of the constitution." Justice Brewer dissenting in *Fong Yue Ting, supra,* 13 S.Ct. at 1039. (emphasis added)

There is no legal impediment to prevent the changing of a rule it realizes is unrealistic and erroneous. Justice Frankfurter once said, "This Court, unlike the House of Lords, has from the beginning rejected the doctrine of disability at self-correction" (*Helvering v. Hallock,* 309 U.S. 106, 121 [1940]); and Justice Murphy has stated, "Stare decisis certainly does not require a court to perpetuate a wrong for which it was responsible, especially when no rights have accrued in reliance on the error." (Dissenting in *Cleveland v. United States,* 329 U.S. 14, 28 [1946].) See also *Girouard v. United States,* 328 U.S. 61 (1946), *United States v. Schwimmer,* 279 U.S. 644 (1929), *United States v. Macintosh,* 283 U.S. 605 (1931), and *United States v. Bland,* 283 U.S. 636 (1931).

> "There are occasions when it is for America to make precedents, and not to obey them. We should, if possible, prove a teacher to posterity, instead of being the pupil of bygone generations. More shall come after us than have gone before; the world is not yet middle-aged." Melville, *White Jacket* 150 (Evergreen ed. 1956) (dealing with flogging in the United States Navy).

The issue here then is not whether Congress has the right to deny and take away "hospitality," but rather the Constitution limits Congress from acting in a manner which discriminates against classes of resident aliens, solely on the basis of their place of birth.

This Court therefore has the power and the duty to declare this arbitrary distinction between Irishmen, Frenchmen, Germans (Eastern Hemisphere) and Mexicans (Western Hemisphere) unconstitutional. *Wallace v. Currin* (C.A. 4th 1928), 95 F.2d 856, 867; *Detroit Bank v. United States,* 317 U.S. 329, 337 (1943); and *Steward Machine Co. v. Davis,* 301 U.S. 548, 584 (1937).

2. AN IMPORTANT ISSUE RELATING TO STATUTORY CONSTRUCTION IN IMMIGRATION CASES IS INVOLVED HEREIN.

A. In a deportation proceeding based on a charge of possession of marijuana after entry, a lawful permanent resident of the United States for more than seven years and native of the Western Hemisphere is statutorily eligible to seek discretionary relief from deportation pursuant to Sections 245 and 212(c) of the I & N Act.

There is perhaps no stronger impediment for excludability nor stronger catalyst for deportation from this country in the entire field of immigration law than a conviction of a narcotics offense.

Prior and present administrative practice as well as tacit Congressional approval permit a respondent in a deportation proceeding to seek relief under section 212(c) of the I & N Act, notwithstanding the language in the code which states: "Aliens lawfully admitted for permanent residence . . . who are returning to a lawful unrelinquished domicile." See *Matter of Smith,* 11 I & N Dec. 325 (Int. Dec. No. 1510—October 8, 1965); *Matter of S.,* 6 I & N Dec. 392, 394 (decided by the Board 1954) and 2 Gordon & Rosenfield, *Immigration Law and Procedure,* §§ 7.4, *et seq.*

The authors of *Immigration Law and Procedure, supra,* discuss the purpose of 212(c) at pages 7-28:

> "In order to lessen the rigors of this principle (exclusion of aliens upon re-entry), which otherwise might command the exclusion and deportation of many long-time residents, Congress fashioned a device to permit waiver of the defect. This was the so-called Seventh Proviso to Section 3 of the Immigration Act of 1917, which

> provided: '*That aliens returning after a temporary absence to an unrelinquished United States domicile* of seven consecutive years may be admitted in the discretion of the Attorney General, and upon such conditions as he may prescribe.' This language obviously dealt with aliens seeking entry. But experience in administration demonstrated a need to apply it also to afford relief for *aliens in the United States.*" (Additions and emphasis added.)

The technical objection to the availability of 212(c) relief, to wit, that a lawful resident is not literally "returning to the United States" was overruled in *Matter of Smith,* 11 I & N Dec. 325 (Int. Dec. No. 1510—October 8, 1965). The petitioner in this case last entered the United States as a permanent resident on June 13, 1956. An order to show cause in *Matter of Smith* was issued on March 1, 1962, charging the petitioner with deportability under section 241(a) (4), as an alien who after entry was convicted of two separate and distinct crimes involving moral turpitude. The two convictions occurred on January 28, 1960 and February 6, 1962, respectively. During the deportation hearing on December 8, 1964, the applicant's counsel submitted an application for adjustment of status under section 245 of the I & N Act (*Tibke v. I.N.S.,* 384 F.2d 42 [1964]). In conjunction with the section 245 relief, adjustment of status, the respondent sought relief under section 212(c).

Regarding the application for 212(c) relief, the respondent requested advance permission to return

to an unrelinquished domicile and stated that he would be inadmissible because of the two prior convictions involving moral turpitude. Section 212(c) relief was sought in order to avoid applicability of section 212(a) (9), which excludes aliens from the United States who have been convicted of a crime involving moral turpitude. A waiver of excludability under section 212(a) (9) would make the respondent available to section 245 relief which permits the adjustment of status "if . . . (2) the alien is eligible to receive an immigrant visa and he is admissible to the United States for permanent residence . . .".

The cases *Matter of Smith, supra,* and this case before the Court, are substantially similar in that section 212(c) relief was sought, in a deportation proceeding, to remove a future impediment from entry to this country. In addition section 212(c) was used as a shield from deportation.

In *Matter of Smith,* as in the instant case, the Service prevailed in its urging upon the Special Inquiry Officer, that section 212(c) is limited to exclusion proceeding where an alien is technically returning to the United States. This precise issue is raised at page 326 of the *Matter of Smith* opinion. At page 327 the Board states:

> "We find no valid reason for denying him the benefits of Section 212(c) *on the technical ground that he is not returning to the United States after a voluntary departure.* Such a conclusion is not required by the statute and would ignore substance for procedure. In fact, there is a provision in 8 C.F.R. 212.3, which permits an appli-

> cation for relief under Section 212(c) to be adjudicated in a deportation proceeding." (Emphasis added.)

See also Gordon & Rosenfield, *Immigration Law and Procedure* § 7.4(d), pp. 7-36, *supra,* where the authors pointed out that 8 C.F.R. 212.3 allows consideration of 212(c) applications in deportation proceedings pending before a Special Inquiry Officer and see also *Matter of S.,* 6 I & N Dec. 392, *supra.* The administrative interpretation and practice with respect to allowing section 212(c) relief in deportation proceedings should be accorded great weight as extrinsic aid in the interpreting of the statute by this Court. 3 Sutherland Statutory Construction § 6605, n.5, pp. 290-291.

Petitioner must candidly point out that this precise contention was rejected by the Ninth Circuit in *Arias-Uribe v. I.N.S.* (9th Cir. 1972). 466 F.2d 1198 and re-affirmed by the Ninth Circuit (Appendix p. 3)

CONCLUSION

It is therefore submitted that the technical objection raised by the Service below that petitioner was not "technically returning to the United States" has been decided against the Service in *Matter of Smith, supra.* Further, based upon administrative practice, tacit Congressional approval, the decisions of the Board, and the due process and equal protection clauses of the Constitution compel the availability of discretionary relief in this case.

For these reasons, a writ of certiorari should issue to review the judgment of the opinion of the Ninth Circuit.

Dated, Ventura, California,
September 16, 1974.

Respectfully submitted,
GHITTERMAN, ESKIN, SCHWEITZER & HERRERAS, etc.
By WILLIAM A. HERRERAS,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
For The Ninth Circuit

Joseph Luis Dunn, Petitioner-Appellant, vs. Immigration and Naturalization Service, Respondent-Appellee.	No. 72-2463 OPINION

[June 27, 1974]

Appeal from the Board of Immigration Appeals

Before: CHAMBERS and SNEED, Circuit Judges, and KING,* District Judge.

KING, District Judge:

Petitioner seeks review of a final order of deportation and of the determination of the Board of Immigration Appeals denying his Motion to Reopen the deportation proceedings. Review is authorized by Section 106 of the Immigration and Nationality Act (hereinafter the Act), 8 U.S.C. § 1105a. The Board held that petitioner, a native of the Western Hemisphere, was statutorily ineligible for discretionary relief from deportation as provided in § 245 of the Act, 8 U.S.C. § 1255(c).

*The Honorable Samuel P. King, United States Judge for the District of Hawaii, sitting by designation.

The decision of the Board of Immigration Appeals is affirmed.

Two basic questions are raised by the Petitioner. First: whether he is statutorily eligible for relief under § 212(c) of the Act, 8 U.S.C. § 1182(c). Second: whether the statutory authority and administrative practice of providing discretionary relief from deportation, in the form of adjustment of status pursuant to § 245 of the Act, to natives of the Eastern Hemisphere and denying such relief to natives of the Western Hemisphere is Constitutional.

Petitioner is a male alien twenty-six years old, a native and citizen of Mexico, who entered the United States as a permanent resident in 1959. He is married to a United States citizen and has a minor child who was born of this marriage.

On April 30, 1969, in a state court of California, Petitioner was convicted of the unlawful possession of marihuana, in violation of § 11530 of the California Health and Safety Code. A judgment was entered on May 23, 1969, committing him to the Director of Corrections for placement. He was sent to the California Rehabilitation Center from which he was released on November 25, 1970.

Subsequently, proceedings were instituted to deport Petitioner pursuant to § 241(a) (11) of the Act, 8 U.S.C. § 1251(a) (11),[1] as an alien convicted of any

[1]Section 241(a)(11) provides in relevant part:

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

. . . .

law relating to the illicit possession of marihuana. In an order of the Special Inquiry Officer dated August 7, 1969, Petitioner was found deportable as charged and was ordered to be deported to Mexico.

On September 12, 1969, the Special Inquiry Officer again having the case before him on a Motion for Reconsideration, affirmed his original order. An appeal from the order was dismissed on December 31, 1969, by the Board of Immigration Appeals. Petitioner then made a Motion for Review of the order of deportation to this Court, which was denied on August 30, 1970.

Thereafter, a private bill, on behalf of Petitioner was introduced in the United States Congress. The Immigration Service advised him on March 2, 1972, that Congress had taken adverse action on the bill and granted him until March 20, 1972, to present himself for deportation to Mexico.

On March 9, 1972, Petitioner filed a Motion to Reopen and Stay Deportation Proceedings, which was denied by the Board of Immigration Appeals on May 15, 1972. The Petitioner subsequently filed the instant Petition for Review of the denial by the Board of his Motion to Reopen. He has never left the United States since his original entry.

Petitioner urges that he should be eligible for discretionary relief from deportation under § 212(c) of

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"(11) is or hereafter at any time after entry has been . . . convicted of a violation of . . . any law or regulation relating to the illicit possession or traffic in narcotic drugs or marihuana."

the Act, 8 U.S.C. § 1182(c),[2] even though he is not technically "returning to the United States after a voluntary departure." In effect Petitioner is requesting advance permission to return to an unrelinquished domicile, despite the fact that otherwise he would be ineligible for admittance under § 212(a) (23), 8 U.S.C. § 1182(a) (23), as an "alien who has been convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana."

As petitioner recognizes in his brief, this precise contention was rejected by this court in *Arias-Uribe v. Immigration and Naturalization Service,* 466 F.2d 1198 (9th Cir. 1972). We remain persuaded that that case properly interprets the statute.

Petitioner further contends that it is unconstitutional to deny eligibility for an adjustment of alien status under § 245 of the Act, 8 U.S.C. § 1255,[3] to

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[2]Section 212(c) of the Act provides in relevant part:
"aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to paragraphs (1)-(25) . . . of subsection (a) of this section."

[3]Section 245 of the Act provides in relevant parts:
"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available at the time of his application.

. . . .

(c) The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere. . . ."

natives of the Western Hemisphere, while no such restriction is placed on natives of the Eastern Hemisphere.

In *Harisiades v. Shaughnessy, District Director of Immigration and Naturalization Service,* 342 U.S. 580 (1952) the Court stated that the government's power to terminate its hospitality towards any class of aliens has been asserted and sustained as an essential element of international relations since the question first arose.

Mr. Justice Frankfurter in his concurring opinion in *Harisiades* notes:

> But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. . . . But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens may be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions. . . . (at page 597)

It is firmly established that Congress has the power to exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to the country, establish regulations for sending out of the country such aliens as come here in violation of law and commit the enforcement of such provisions to the appropriate executive officers. *See Graham v. Richardson,* 403 U.S. 365 (1971); *Carlson v. Landon,* 342 U.S. 524 (1952); *Takahashi v. Fish and Game Commission,* 334

U.S. 410 (1948); *Fong Yue Ting v. United States,* 149 U.S. 698 (1893); *Uribe-Temblador v. Rosenberg,* 423 F.2d 717 (9th Cir. 1970); *Talanoa v. Immigration and Naturalization Service,* 397 F.2d 196 (9th Cir. 1968).

The Immigration and Nationality Act of 1952 originally provided in § 101(a) (27) (c) that a nonquota immigrant included:

> (c) an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and the spouse or child of any such immigrant, if accompanying or following to join him;

This section conferred a benefit on the majority of Western Hemisphere countries in that they were free from immigration quotas imposed on most other countries.

Section 245 of the Act of 1952 was a method of balancing the equities between quota and nonquota countries by withholding benefits of adjustment of status from those entitled to nonquota status as natives of Western Hemisphere countries.

Legislation enacted in 1958 eliminated preclusion of adjustment of status for Western Hemisphere natives and instead withheld this remedy from natives of continguous countries and adjacent islands.[4]

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[4]Section 245(c), Act of 1952, 8 U.S.C. § 1255(c) as amended by the Act of August 21, 1958, 72 Stat. 699.

In 1960 expansion of statutory benefit was accomplished by an amendment which made adjustment of status available to all aliens, except those entering as alien crewmen, who were inspected by immigration officers and admitted or paroled into the United States.[5]

Section 245(c) of the Act takes its present form from the 1965 Amendment restoring the original bar of adjustment of status for natives of Western Hemisphere countries and adjacent islands.[6] Congress was concerned that the Immigration and Naturalization Service had serious recurring problems in processing an increasing number of natives of Central and South America, who came to the United States as nonimmigrant visitors and promptly sought permanent residence under § 245 of the Act.[7]

As noted above, the provision presently under attack is well within the power of Congress. There is a rational basis for the distinction between aliens from the Eastern Hemisphere and aliens from the Western Hemisphere for purposes of relief from deportation pending adjustment of status. Further inquiry into the rationale of § 245 of the Act by this Court is not required.

Affirmed.

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[5]Section 245(c), Act of 1952, 8 U.S.C. § 1255(c) as amended by the Act of July 14, 1960, 74 Stat. 505.

[6]Section 245(c), Act of 1952, 8 U.S.C. § 1255(c) as amended by the Act of October 3, 1965, 79 Stat. 919.

[7]S. Rep. No. 748, 89th Cong., 1st Sess., p. 3343 (1965).

Appendix B

U. S. Department of Justice
Board of Immigration Appeals

[May 15, 1972]

File: All 941 074—Los Angeles

In re: Joseph Luis *Dunn* aka Joseph Luis Dunn-Marin

In Deportation Proceedings
Motion

On Behalf of Respondent:

William A. Herreras, Esq.
Ghitterman & Eskin
3212 Loma Vista Road,
Suite 230
Ventura, California 93003

Charges:

Order: Section 241(a)(11), I&N Act (8 U.S.C. 1251(a)(11))—Convicted of violation of law relating to illicit possession of marijuana, to wit, section 11530, California Health and Safety Code (1969)

Lodged: None

Application: Motion to reopen deportation proceedings to permit respondent to apply for advance permission to return to an unrelinquished domicile pursuant to section 212(c) of the Immigration and Nationality Act

This case is before us upon motion by respondent to reopen the deportation proceedings to afford him an opportunity to apply for relief under section 212(c) of the Immigration and Nationality Act. The Service opposes the motion to reopen. The motion will be denied.

The record relates to a 24-year-old male alien, a native and citizen of Mexico. He is married to a United States citizen and has a three-year-old minor child who was born in the United States of this marriage. He was admitted to the United States for permanent residence on May 26, 1959. On April 30, 1969, in the Superior Court of the State of California for the County of San Luis Obispo, respondent was convicted of the offense of unlawful possession of marijuana in violation of section 11530 of the California Health and Safety Code. A judgment was entered by the aforementioned court on May 23, 1969 holding that, upon medical evidence, respondent is a narcotic drug addict within the meaning of section 3150 of Welfare and Institutions Code and committing him to the Director of Corrections for placement as provided by law, for a period of ten years, except as earlier discharge is provided by law. He was committed to the California Rehabilitation Center as an inmate, apparently to receive treatment under the foregoing judgment and commitment as a narcotic drug addict. In an order of the special inquiry officer dated August 7, 1969, respondent was found deportable as charged in the Order to Show Cause and was ordered to be deported from the United States to Mexico. Deportability was conceded. On September

12, 1969, the special inquiry officer again having the case before him on motion for reconsideration, affirmed his original order. An appeal from the special inquiry officer's order was dismissed on December 31, 1969.

Respondent petitioned for review of the order of deportation in the United States Court of Appeals for the Ninth Circuit and on April 30, 1970 the court denied the petition. Thereafter, a private bill was instituted by the respondent in the United States Congress. The Service advised the respondent on March 2, 1972 that Congress had taken adverse action on the bill and granted him until March 20, 1972 to present himself for deportation to Mexico. The respondent was released from the California Rehabilitation Center on November 25, 1970.

Counsel for respondent maintains that the respondent is statutorily eligible for relief from deportation pursuant to section 212(c) of the Act. Section 212(c) provides in substance that aliens lawfully admitted for permanent residence, who temporarily proceed abroad voluntarily and not under an order of deportation and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds for exclusion enumerated in section 212(a) of the Act, including an alien convicted of a narcotic violation as set forth in section 212(a)(23).

The respondent in the case before us, a native of the Western Hemisphere, is not eligible for relief

under section 245 of the Act. We held in *Matter of Arias-Uribe,* Interim Decision 2082 (BIA April 30, 1971) that where a section 212(c) application is not coupled with an application for adjustment of status under section 245 of the Act, we have no basis for avoiding the statutory requirement that an alien lawfully admitted for permanent residence must be returning to resume a lawful domicile of seven consecutive years following a temporary, voluntary departure not under an order of deportation. Respondent has had no entry preceded by a voluntary departure since he became deportable under section 241(a)(11) of the Act by reason of his conviction as a narcotic violator in April 1969. In support of the motion to reopen, counsel has attached a copy of his brief filed in the United States Court of Appeals for the Ninth Circuit with his petition for review of the order in *Matter of Arias-Uribe,* supra. We rejected the position taken by counsel with respect to section 212(c) in *Matter of Arias-Uribe,* supra, and since the case before us falls squarely within *Matter of Arias-Uribe,* supra, we will deny the motion. Accordingly, the following order will be entered.

ORDER: It is ordered that the motion to reopen the deportation proceedings be and the same is hereby denied.

/s/ Maurice A. Roberts
Chairman

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-321

JOSEPH LUIS DUNN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native of Mexico, seeks review of an order denying a motion to reopen deportation proceedings. He claims that (1) he is eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (Section 212(c) of the Immigration and Nationality Act) without regard to his conviction for a narcotics violation and that (2) if he is not so eligible, the statutory scheme is unconstitutional because it discriminates against natives of the Western Hemisphere.

Petitioner entered the United States as a permanent resident in 1959. In August 1969, he was ordered deported to Mexico under Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1251 (a)(11),[1] as an alien convicted of violating

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[1] 8 U.S.C. 1251(a)(11) provides in relevant part:

(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

a law relating to the illicit possession of marijuana.[2] The court of appeals in April 1970 affirmed the order of deportation (Pet. App. A , p. iii; 426 F. 2d 894).

On March 9, 1972, petitioner filed a motion to reopen and stay deportation proceedings in order to afford him an opportunity to apply for relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c).[3] That Section permits aliens admitted for permanent residence "not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years" to be admitted to the United States at the discretion of the Attorney General without regard to the provisions excluding them from the United States. The Board of Immigration Appeals denied the motion, ruling that there was "no basis for avoiding the statutory requirement that an alien lawfully admitted for

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* * * *

> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * * .

[2]Petitioner had previously pleaded guilty to one count of possession of marijuana in violation of state law. Two other counts involving possession and transportation of about one pound of heroin were dismissed.

[3]8 U.S.C. 1182(c) provides, in relevant part, as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25) * * * of subsection (a) of this section.

permanent residence must be returning to resume a lawful domicile of seven consecutive years following a temporary, voluntary departure and not under an order of deportation" (Pet. App. B, p. xi). The court of appeals, relying on its earlier decision in *Arias-Uribe* v. *Immigration and Naturalization Service*, 466 F. 2d 1198, affirmed (Pet. App. A).

1. Petitioner contends that he is eligible for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), even though he is under an order of deportation and not returning to the United States after a voluntary departure.[4] The discretionary waiver of exclusion provided for under Section 212(c) (8 U.S.C. 1182(c)) does not, however, apply to petitioner. It is, by its terms, available to permanent resident aliens returning to the United States from abroad and who are not under an order of deportation.[5]

2. Even assuming *arguendo* that the statute is also available to permanent residents aliens who, although under a deportation order, have not yet left this country, if they are eligible for an adjustment of status under Section 245 of the Act, 8 U.S.C. 1255, *Matter of Smith*,

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[4]Petitioner's contention here was rejected by the Ninth Circuit in unreported orders in *Martin Rendon-Rojas* v. *Immigration and Naturalization Service*, No. 74-2264, decided September 27, 1974, and *Benjamin Rodriquez* v. *Immigration and Naturalization Service*, No. 74-2226, decided August 16, 1974.

[5] *Matter of Smith, supra*, on which petitioner relies, does not support his position. In that case the applicant was deportable as an alien who had been convicted of two crimes involving moral turpitude, neither of which involved a narcotics offense. An alien convicted of non-narcotics offense involving moral turpitude, although generally excludable from the United States, may obtain a visa for entry into this country if his exclusion "would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughter of such alien.", 8 U.S.C. 1182(h) (Section 212(h) of the Act, as amended). However, no similar provision is applicable to narcotics offenders, such as petitioner.

11 I & N Dec. 325; *Arias-Uribe* v. *Immigration and Naturalization Service,* 466 F. 2d 1198, 1199 (C.A. 9), petitioner, as a native of the Western Hemisphere, is ineligible for adjustment of status under Section 245(c) (8 U.S.C. 1255(c)). It is well established that Congress has the "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123; see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767, quoting with approval the opinion of Mr. Justice Frankfurter in *Galvan* v. *Press,* 347 U.S. 522.[6] Since Congress may exclude all aliens from the Western Hemisphere, it follows *a fortiori* that Congress may limit the discretion of the Attorney General with regard to relief from deportation orders for natives of the Western Hemisphere found guilty of a narcotics offense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[7]

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[6]See also *Faustino* v. *Immigration and Naturalization Service,* 432 F.2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; *Talanoa* v. *Immigration and Naturalization Service,* 397 F.2d 196 (C.A. 9), *Hitai* v. *Immigration and Naturalization Service,* 343 F.2d 466, 467 (C.A. 2), certiorari denied, 382 U.S. 316; *Buckley* v. *Gibney,* 332 F. Supp. 790 (S.D.N.Y.), affirmed, 449 F.2d 1305 (C.A. 2), certiorari denied, 405 U.S. 919.

[7]This issue is also raised in the petition for a writ of certiorari filed in *Anna DiMattina formerly known as Anna Zampitella* v. *Immigration and Naturalization Service,* No. 74-202, in a case arising from the Third Circuit.